

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
Telecommunications Relay Services and)	
Speech-to-Speech Services for)	CC Docket No. 98-67
Individuals with Hearing and Speech)	
Disabilities)	

PETITION FOR CLARIFICATION AND/OR RECONSIDERATION

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EXECUTIVE SUMMARY

WorldCom, Inc., d/b/a MCI, respectfully requests the Commission to reconsider its apparent decision to eliminate two-line Hearing Carryover (HCO) as a means by which IP Relay providers could satisfy the HCO requirement prior to the waiver of this requirement. Two-line HCO exactly satisfied the HCO requirement as stated in the *Internet Relay Order*, and the Commission's HCO requirement did not rule out two-line HCO from meeting the HCO requirement. The Commission's decision, in effect, retroactively changed an established rule and is therefore reversible error. MCI also respectfully requests the Commission to clarify whether its rule requiring IP Relay providers to provide access to pay-per-call services allowed it to disconnect a call if the pay-per-call provider did not accept alternate billing information. In the event the Commission determines that the provision of two-line HCO over IP Relay did not meet the former HCO requirement, and that IP Relay providers were prohibited from disconnecting a 900 number call if alternate billing methods were not accepted, MCI then requests the Commission to reconsider its decision to deny cost recovery to IP Relay providers who provided all mandatory services except HCO and either tried to provide access to 900 number services or immediately recognized access to pay-per-call services was technically infeasible.

In its *Internet Relay Order* the Commission found that IP Relay was a telecommunications relay service (TRS) and IP Relay providers would be reimbursed out of the Interstate TRS Fund. The Commission granted waivers from certain of its mandatory minimum requirements, but did not waive its HCO or pay-per-call requirements. MCI fully complied with these two requirements as they were articulated in the *Internet Relay Order*.

The *Internet Relay Order* first required IP Relay providers to use IP Relay for the text leg of an HCO call. MCI rationally understood that the Commission was requiring two-line HCO.

With two-line HCO, IP Relay would be used for the text leg of the call, and the voice leg would be handled over a second line. Hence two-line HCO was the means by which the HCO requirement articulated in the *Internet Relay Order* would be implemented. MCI was certain the Commission did not intend to require single line HCO, for it had also determined that voice carry over (VCO) was not technically feasible. If voice and text over a single line had been technically feasible, it would not have waived the VCO requirement. Moreover, the Commission's rules did not specify that single line HCO was the only means the HCO requirement could have been satisfied.

Despite the identity of two-line HCO and the HCO requirement articulated in the *Internet Relay Order*, the Commission's *Reconsideration Order* appeared to clarify that its *Internet Relay Order* intended to require the provision of single line HCO, even though its *Reconsideration Order* admitted single line HCO was not technically feasible to provide. While the Commission's HCO requirement did not specify that *only* single line HCO may be used to comply with this minimum requirement, its *Reconsideration Order* limited the means by which relay providers could implement the HCO requirement to single line HCO. The *Reconsideration Order* therefore retroactively changed the Commission's HCO requirement. MCI requests the Commission to correct this mistake and allow two-line HCO to satisfy the former IP Relay HCO requirement.

The *Internet Relay Order* also did not waive the pay-per-call requirement. The Order recognized that pay-per-call providers would not be able to bill to a caller's originating automatic number identification (ANI), since the call originated on the Internet. So, it required IP Relay providers to manually pass a caller's credit card or telephone number to the pay-per-call provider. The Commission expected that pay-per-call providers would accept this alternate

billing information. MCI did as well. Consequently, MCI established procedures to allow pay-per-call calls to be made. However, after months of attempting to pass alternate billing information, MCI did not succeed in finding a single pay-per-call provider who was willing to accept alternate billing information. Initially, MCI would disconnect the call if the pay-per-call provider did not accept alternate billing methods. Starting October 2002, out of an abundance of caution to ensure it was complying with the pay-per-call requirement, MCI allowed its relay center to be billed for pay-per-call calls. MCI does not believe it was required to allow itself to be billed for calls placed by relay customers, since it had no control over the billing decisions of pay-per-call providers. Moreover, the Commission's relay rules exempt TRS providers from carrying any call if the caller does not receive credit authorization to complete a call. MCI now asks the Commission to clarify whether its rules permitted relay providers to disconnect a call if a pay-per-call provider did not accept alternate billing methods.

The Commission waived the HCO and pay-per-call requirements in its *Reconsideration Order*, but refused to make the waivers retroactive to the date of its Internet Relay Order, stating that it is impermissible to give retroactive effect to rules adopted pursuant to notice and comment rulemaking procedures. However, the rules in question were not final, since Sprint had petitioned the Commission to reconsider both its HCO and pay-per-call requirements. A waiver under these circumstances would not constitute retroactive rulemaking.

Moreover, the Commission has never completely denied reimbursement if relay providers failed to comply with minor aspects of TRS requirements. When the Commission first adopted its minimum requirements for traditional relay, it required carriers to ensure that TRS users would be able to use coins to access relay centers from payphones by July 26, 1993. The Commission waived this "coin sent paid" requirement for two years in November 29, 1993, and

made the waiver's application retroactive back to July 26, 1993. The Commission did not deny TRS providers reimbursement for calls carried between July 1993 and November 1993.

Similarly, the Commission has recently stated that a TRS provider is "eligible for TRS fund reimbursement if it has substantially complied with Section 64.604." There is no doubt that MCI and other providers of IP Relay substantially complied with the Commission's TRS requirements. HCO and pay-per-call services comprise less than one-tenth of one percent of relay calls. IP relay providers have carried millions of relay calls since release of the *Internet Relay Order*, and so probably failed to carry only three out of every five thousand calls as a result of not carrying HCO and pay-per-call calls.

The Commission does not need to be concerned that granting retroactive waivers in this case will encourage carriers to provide regulated services in contravention of its rules, with the hope they will eventually be retroactively rewarded for providing the services. The present circumstances are special, are not easily reproduced, and will not encourage providers to break Commission rules. First, service providers must substantially provide required services and capabilities. Any infractions would need to involve services or capabilities very infrequently used. Second, service providers would have to be very certain they will prevail in showing the requirement is not technically feasible. If they do not prevail, they would not be entitled to retroactive reimbursement. Third, providers must demonstrate that the waiver is in the public interest. If the violations are not inconsequential, the relay community will strongly oppose the petition. Finally, the present request for waivers involves a new relay technology. New technologies will inevitably require second-round adjustments to required standards. If the Commission identifies these as necessary conditions for granting retroactive waivers it will not be establishing a precedent or incentive for a flood of requests for retroactive waivers.

On the other hand, if the Commission denies retroactive waivers for minor deviations from requirements that were technically infeasible to comply with, it will establish a precedent that will delay the introduction and diffusion of innovative relay technologies for years to come. Innovators will be reluctant to begin to offer service if there is any ambiguity in the decision approving their service. It will also encourage competitors who are not ready to offer an innovative service to look for any difficulty an innovating company might have in meeting a requirement, even an insubstantial one, in order to gain time to develop a competing service. The extremely rigid application of its requirements in the *Reconsideration Order* will invite such gaming. The Commission has a statutory obligation to ensure that its regulations do not discourage or impair the development of new relay technologies. If the Commission fails to grant retroactive waivers from extremely minor services, the provision of which turn out to be technically infeasible to provide, it will unleash negative forces that will retard the widespread adoption of future innovative relay services and be acting in opposition to its statutory mandate.

I. RELIEF REQUESTED

WorldCom, Inc., d/b/a/ MCI, respectfully requests the Commission to reconsider its apparent decision to eliminate two-line HCO as a means by which IP Relay providers could satisfy the Hearing Carryover (HCO) requirement. Two-line HCO exactly satisfied the HCO requirement as stated in the *Internet Relay Order*, and the definition of HCO in the Commission's TRS rules does not give preference to either single line or two-line HCO. The Commission's apparent decision retroactively changed an established rule without justification and therefore constitutes reversible error. MCI also respectfully requests the Commission to clarify whether IP Relay providers were permitted to disconnect from a pay-per-call if a pay-per-call provider did not accept alternate billing methods as contemplated in the *Internet Relay Order*. In the event the Commission determines that the provision of two-line HCO over IP Relay did not meet the former HCO requirement, and that IP Relay providers were prohibited from disconnecting a 900 number call if alternate billing methods were not accepted, MCI then requests the Commission to reconsider its decision to deny cost recovery to IP Relay providers who provided all mandatory services except HCO and either tried to provide access to 900 number services or immediately recognized access to pay-per-call services was technically infeasible.¹

II. Background

MCI first began offering persons with speech and hearing disabilities the ability to access relay via the Internet in November 2000. The next month MCI asked the Commission to clarify

¹ If the Commission determines that two-line HCO did satisfy the former HCO requirement, and also finds that carriers, such as MCI, who attempted to connect to pay-per-call services were allowed to disconnect if billing information was not accepted, it should not deny reimbursement to carriers, such as Sprint, who immediately recognized that pay-per-call providers would not accept billing information, and who therefore did not attempt to connect to pay-per-call services.

whether this method of accessing relay centers would be eligible to be reimbursed from the Interstate Relay Fund.² The service was clearly an innovation. It offered the ability to access relay from any web-accessible device, it made it easy to access relay from work without having to use a teletypewriter (TTY), it made two-line Hearing Carry Over (HCO) and two-line voice carryover (VCO) easier to use, and it introduced customer choice into the relay market for the first time, to name a few of the benefits.

It also raised a number of difficult regulatory issues the Commission had not yet considered in the context of relay services. Innovative relay services will almost certainly be made available using different technologies, and will offer different capabilities than traditional relay. Some of these capabilities may exceed traditional relay, while others may not. In approving the use of any new technology to provide relay services, the Commission therefore will need to determine the extent to which the innovative capability requires waivers from the mandatory minimum requirements which apply to traditional relay, and then determine if the waivers are so extensive, and the service and its cost structure so different from traditional relay, that it should be reimbursed at a different rate. Even with the approval of a new service for reimbursement, along with any initial required waivers, the Commission may make mistakes, or unforeseen circumstances may complicate the ability of a new technology to meet TRS mandatory requirements.³ The services at issue in the instant petition are HCO and pay-per-call, or 900 number services.

² *Telecommunications Services for Individuals with Hearing and Speech Disabilities*, WorldCom Petition for Clarification, (*WorldCom IP-Relay Petition*), CC Docket No. 90-571, December 22, 2000.

³ For example, the lack of originating ANI has introduced uncertainties into the provision of and reimbursement for international IP Relay calls.

A. Hearing Carry Over

1. Comments Raised The Possibility of Providing Voice Over One Line and Text Over IP Relay Over A Second Line

The Commission's IP Relay Public Notice sought comments from the general public on a number of issues relevant to its consideration of reimbursement for IP Relay, including the extent to which IP Relay could provide HCO, and VCO.⁴ All commenting parties noted that technical limitations argued against mandating the provision of voice services over the Internet portion of an IP-Relay call.⁵ However, a number of commentators noted that two lines could be used to accommodate voice and the Internet. They noted that one could carry voice and be combined with the text portion of a relay call carried over the Internet via a second line, thus making two-line HCO and two-line VCO possible over IP Relay.⁶

2. The Meaning of the Commission's HCO Requirement Had Several Interpretations

In its *Internet Relay Order or Order*, the Commission appeared to adopt these two viewpoints on the feasibility of voice being carried over IP Relay. It concluded that voice over IP was not technically feasible, stating "...currently IP-Relay can only be accessed by text users." It therefore waived the requirement to offer VCO, which included the ability to transmit

⁴ *Consumer Information Bureau Seeks Additional Comment On The Provision Of Improved Telecommunications Relay Service*, Public Notice, DA 01-1555, CC Docket No. 98-67, Released June 29, 2001, at 4.

⁵ *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67, July 31, 2001, Comments of: Sprint Corporation at 4, AT&T at 11; Telecommunications for the Deaf, Inc., at 9; National Association of the Deaf, at 7; WorldCom at 7. WorldCom's June 6, 2001 Ex Parte more clearly stated that voice services were not feasible over IP-Relay. Subsequent filings by WorldCom made this clear. See e.g., *Reply Comments of WorldCom*, August 20, 2001 at 7; *Notice of Ex Parte meeting with Margaret Egler et al.*, March 1, 2002, *Notice of Ex Parte Meeting with Jordan Goldstein and Matt Brill*, April 10, 2002.

⁶ *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Comments of: Dana Mulvaney, July 31, 2001 at 5; Katherine Keller, July 31, 2001 at 1; Ronald Vickery, July 31, 2001 at 2; Telecommunications for the Deaf, Inc., July 31, 2001 at 9; Reply Comments of Dana Mulvaney, August 20, 2001 at 4.

voice and text on a single line. Then, appearing to echo parties' discussion of integrating voice over one line and text messaging over the Internet via a second line, the Commission went on to state that it saw "...no reason why IP Relay cannot be used for the text leg of an HCO call, and therefore we do not waive this requirement."⁷

As will be discussed below, the requirement to provide HCO over the text leg of an IP Relay call is fully satisfied by the provision of two-line HCO, so MCI was confident that by providing two-line HCO it would fully comply with the HCO requirement articulated in the *Order*. Consequently, after release of the *Order*, MCI felt assured that its two-line HCO was fully compliant with the HCO requirement as articulated in the Commission's *Internet Relay Order*.

Others had different interpretations of the Commission's meaning. AT&T thought the Commission had required IP Relay providers to connect to a Baudot-based HCO user, and asked the Commission clarify the meaning of its requirement that IP Relay carry the text leg of an HCO call.⁸ Sprint interpreted the *Order* as requiring single line HCO and asked the Commission to waive any requirement to provide single-line HCO in its Petition for Reconsideration.⁹ A number of other parties adopted Sprint's interpretation and supported Sprint's request to waive

⁷ *Provision of Improved Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, Petition for Clarification of WorldCom, Inc., Declaratory Ruling and Second Further Notice of Proposed Rulemaking, (Internet Relay Order)*, CC Docket No. 98-67, April 22, 2002, at & 32.

⁸ *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 96-128, AT&T, Reply to Petitions for Reconsideration, August 13, 2002.

⁹ *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 96-128, Sprint Corporation, Petition for Reconsideration, July 11, 2002.

any single-line HCO requirement.¹⁰ In response to these different interpretations, MCI asked the Commission to clarify whether the requirement to offer HCO over the text leg of an IP Relay call was a requirement to provide two-line HCO.¹¹

B. Pay-Per-Call Services

1. The Commission Required Relay Providers To Pass Alternate Billing Information

In requiring traditional relay to provide access to pay-per-call services, the Commission had stated it would be possible for a pay-per-call provider to bill to a user's credit card.¹² MCI, echoed this finding in its reply comments.¹³ The Commission, in turn, required IP Relay providers to pass along either credit card information or the telephone number of the person attempting to make a 900 number call in order to provide access to pay-per-call services.¹⁴

2. MCI Provided Access to Pay-Per-Call Services

The Internet Relay Order clearly contemplated that pay-per-call providers would accept alternate billing methods. MCI also expected pay-per-call providers to accept alternate billing methods and, soon after the Order was released, initiated procedures to connect IP Relay users to pay-per-call services. MCI first established a separate web page from which IP Relay customers

¹⁰ *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 96-128, Replies to Petitions for Reconsideration: Hamilton, July 26, 2002; AT&T, August 13, 2002; SHHH, December 5, 2002; TDI, December 9, 2002.

¹¹ *Ex Parte Letter from Larry Fenster to Marlene Dortch*, November 20 2002, CC Docket No. 98-67. See also *Ex Parte Letters from Larry Fenster to Marlene Dortch*, January 23, 2003, CC Docket No. 98-67.

¹² *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, Report and Order and Further Notice of Proposed Rulemaking (Advanced Services Order)*, CC Docket No. 98-67, released March 6, 2000, & 98, fn 200.

¹³ *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 96-128, WorldCom Comments, July 31, 2001 at 7.

¹⁴ *Internet Relay Order* at & 34.

would make a 900 number call. A separate web page was used to provide users with information about alternate billing. This web page was enabled with a java applet that would dial a special access number back to CAs indicating a 900 number call was being requested.

Communications Assistants (CAs) receiving requests to access pay-per-call services were instructed to direct the caller to customer service if they did not see the special access number. Customer service then directed callers to the appropriate web page. CAs were also instructed to disconnect a 900 number call if the pay-per-call provider did not accept alternate billing methods, as contemplated in the *Order*.

The first week in August 2002, we received our first customer service inquiry suggesting our 900 number procedures needed improvement. Upon reviewing records, we found that only 25 calls had been attempted, but none of them had reached the announcement message of a pay-per-call provider. After several test calls, we identified three reasons: 1) CAs were attempting to connect to a pay-per-call provider even though the caller was connecting from the standard IP Relay access page not the special 900 access web page, so these calls were automatically rejected by the CA's console. Instead, CAs should have referred these calls to customer service; 2) customer service representatives were mis-typing the web page address (which was fairly complicated), so the user would not be able to find the IP Relay 900 access page; and 3) users were mis-typing the web page address needed to find the 900 access web page for IP Relay and were not be able to connect into IP Relay.

We responded by providing additional training to customer service representatives and by directing all requests for 900 number calls to a few, specially trained CAs. Therefore, by mid-August, 900 number calls dialed by CAs began reaching the introductory disclosure messages of pay-per-call providers. As discussed above, our CAs had been instructed to disconnect the call if

the disclosure message did not permit the call to be billed by a method other than bill-to-ANI. We still expected alternate billing methods to be accepted, but two months and 40 call attempts later, we concluded that today's pay-per-call providers do not accept alternate billing methods as contemplated in the *Order*. In mid-October, we therefore decided to allow our relay center to be billed for 900 number calls delivered from our pay-per-call access page, even though pay-per-call providers did not accept alternate billing.

III. THE COMMISSION SHOULD RECONSIDER ITS DECISION TO LIMIT THE MEANS BY WHICH IP RELAY PROVIDERS COULD HAVE SATISFIED THE HCO REQUIREMENT

A. The HCO Requirement Only Made Sense As Two-Line HCO

In its *Internet Relay Order or Order*, the Commission adopted two viewpoints on the feasibility of voice being carried over IP Relay. On the one hand, it clearly believed that voice and text over a single Internet connection was not technically feasible, for it completely waived the VCO requirement. Then, echoing parties' discussion of integrating voice over one line and text messaging over a separate Internet connection, the Commission then went on to state that it saw "...no reason why IP Relay cannot be used for the text leg of an HCO call, and therefore we do not waive this requirement."¹⁵

Two-line HCO is the only means by which a user could initiate an HCO call where only the text leg of the call is carried over the Internet. MCI rationally concluded that the Commission could not have meant to require IP-Relay providers to offer single line HCO. There would have been no need to differentiate the text leg of the call from the voice leg, and then limit the Internet portion of the call to the text leg if the Commission had intended to require the provision of single line HCO. If single line HCO had been technically feasible, it would have

¹⁵ *Internet Relay Order*, & 32.

been possible to carry both the voice and text leg of the call over the Internet. But the Commission also completely waived the VCO requirement which included the ability to carry voice and text over a single line. MCI's provision of two-line HCO therefore implemented the HCO requirement as articulated in the *Order*.

B. Two-Line HCO Satisfied The Commission's HCO Requirement

Even if the Commission didn't intend two-line HCO when it required IP Relay to be used for the text leg of an HCO call, providing two-line HCO would nevertheless satisfy the Commission's requirement to provide HCO. The Commission has defined HCO as a "reduced form of TRS where the person with the speech disability is able to listen to the other end user and, in reply, the CA speaks the text as typed by the person with the speech disability."¹⁶ The Commission's *Internet Relay Order* clearly did not waive all means by which IP-Relay providers were required to provide HCO. But neither does the *Order* specify the means by which IP-Relay providers might provide HCO.

Providing two-line HCO meets the mandatory HCO requirement just as single-line HCO does. The Commission's rules do not specify the technical arrangements relay providers must utilize to provide this service.¹⁷ The Commission's definition of HCO applies to single line and two-line HCO equally. And nowhere in the *Internet Relay Order* does the Commission specify it required the provision of single line HCO. By providing text messaging over an Internet connection, and voice messaging over a second line, an IP-Relay provider is able to provide this reduced form of TRS where the person with the speech disability is able to listen to the other end user and, in reply the CA speaks the text as typed by the person with the speech disability.

¹⁶ 47 C.F.R. § 64.601(7).

¹⁷ 47 C.F.R. § 64.604(b)(5).

C. The Commission's Reconsideration Decision To Allow Only Single Line HCO To Satisfy the HCO Requirement Amounts To Retroactive Rulemaking

As discussed in Section II.A above, two-line HCO exactly satisfied the HCO requirement as articulated in the *Internet Relay Order*. And as discussed in Section II.B above, the Commission's rules allow the HCO requirement to be met equally by single line or two-line HCO.¹⁸ Therefore, even if the Commission did not explicitly state that it had required two-line HCO, relay providers who offered two-line HCO did satisfy the HCO requirement. It is noteworthy that nowhere does the *Internet Relay Order* specifically require single line HCO, and nowhere do the Commission's rules limit HCO to single line HCO. MCI's provision of two-line HCO exactly complied with the HCO requirement as articulated in the *Order*. Therefore, MCI had every expectation that it had fully complied with the IP Relay HCO requirement by providing two-line HCO capability.¹⁹

In the *Reconsideration Order*, the Commission distinguished between single line and two-line HCO for the first time.²⁰ The Commission also appeared to conclude that the only way the HCO requirement could be met prior to the *Reconsideration Order* was if IP Relay providers had offered single line HCO.²¹ If the Commission did indeed reach this conclusion, it did so without addressing MCI's argument that relay providers who offered two-line HCO complied

¹⁸ Of course, there is no technical limitation to providing single line HCO for traditional relay.

¹⁹ MCI was not aware of the possibility that the Commission might limit the HCO requirement to single line HCO until Sprint disclosed in its Ex Parte Letter, CC Docket No. 98-67, October 31, 2002 that it had been denied reimbursement from NECA.

²⁰ *Provision of Improved Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, Petition for Clarification of WorldCom, Inc.*, Order on Reconsideration, (*Reconsideration Order*), CC Docket No. 98-67, March 14, 2003, && 17, 18.

²¹ Unless the Commission's denial of reimbursement for Sprint was based solely on Sprint's non-compliance with the pay-per-call requirement, since Sprint, like MCI and AT&T, was providing two-line HCO over IP Relay.

with the requirement to use IP Relay for the text leg of an HCO call.²² Its decision fails to explain why it believes parties should have known that the language in the *Order* limiting IP Relay to the text leg of an HCO call could possibly have been interpreted to require single line HCO, when single line HCO would require IP Relay to provide the text and voice legs of the call over a single line, something the Commission recognized in the *Order* was not possible when it determined that single line VCO was not technically feasible.

More importantly, the Commission's HCO requirement does not specify that *only* single line HCO may be used to comply with the minimum requirement.²³ But by limiting the means by which relay providers could comply with the Commission's HCO requirement to single line HCO when no prior limitation existed, the Commission's *Reconsideration Order* effectively engaged in retroactive rulemaking. MCI urges the Commission to reconsider and declare that IP Relay providers who offered two-line HCO complied with the HCO requirement as stated in the *Internet Relay Order*.

IV. THE COMMISSION SHOULD CLARIFY THE MEANING OF ITS PAY-PER CALL REQUIREMENT

A. The Commission Should Clarify That Its Pay-Per-Call Requirement Did Not Prohibit IP Relay Providers From Disconnecting if the Pay-Per Call Provider Did Not Accept The Caller's Billing Information.

The TRS mandatory requirements differ depending on whether the relay center has the ability to implement the requirement independently, or whether the requirement depends in part on telecommunications carriers or entities not regulated by the Commission. Most requirements can be implemented independently. But a few, such as equal access to interexchange carriers,

²² *Ex Parte Letter from Larry Fenster to Marlene Dortch*, November 20 2002, CC Docket No. 98-67. See also *Ex Parte Letters from Larry Fenster to Marlene Dortch*, January 23, 2003, CC Docket No. 98-67.

²³ 47 C.F.R. § 64.604(b)(5).

and access to voice mail, interactive menus, and pay-per-call services, require the cooperation of other entities to be fully implemented. For example, relay centers do not provide interactive voice mail services. In its *Advanced Services Order*, the Commission noted that interactive voice systems presented information too fast for TRS consumers to use.²⁴ Nevertheless, the Commission required relay centers to provide access to interactive menus. The Commission recognized that relay centers did not have the ability to develop software that would allow a user to choose the speed with which information was transmitted over interactive voice systems.²⁵ Rather, the Commission required relay centers to introduce technically feasible procedures that would accommodate relay users to the existing pace of interactive voice systems. Thus, for example, the Commission required relay centers to immediately notify a caller of the presence of an interactive voice menu to allow a caller to request a summary, rather than a verbatim, transmission of the information.²⁶ The requirement to provide access to interactive voice systems did not guarantee that the summary provided would adequately capture the information contained in the interactive voice system. It merely required the relay center to implement procedures to accommodate the caller to a service outside the control of the relay provider.²⁷

Similarly, the Commission recognized the inability of pay-per-call providers to automatically bill to the ANI of IP Relay users, but accommodated users to this service feature

²⁴ *Advanced Services Order*, & 92.

²⁵ *Id.*, & 93.

²⁶ *Id.*, & 94.

²⁷ Another example of this approach involves the requirement of traditional relay providers to provide access to the caller's carrier of choice. To a great extent, the determining factor in a consumer's ability to use its carrier of choice is the willingness of its carrier to locate at a tandem switch near the relay center. If a customer requests a carrier who has not located at the tandem near the relay center, MCI will contact the customer's carrier and ask them to contact a local exchange carrier to establish a trunk from their switch to the tandem. But MCI cannot require the carrier to do so.

outside the control of relay centers, by requiring CAs to pass credit card information or the caller's telephone number to the pay-per-call provider. However, the Commission's pay-per-call relay requirement does not guarantee that the pay-per-call provider will accept this accommodation, just as the Commission's requirement to provide "hot keys" when encountering interactive voice menus does not guarantee that summaries will be successful. It merely requires relay providers to implement measures to accommodate the inability of a pay-per-call provider to automatically bill to the ANI of IP Relay users.

In contrast, when the Commission's rules pertain to relay services that are within the control of the relay provider, the Commission's rules go beyond implementing accommodation procedures. They require specific, measurable, outcomes to achieve functional equivalency. For example: CAs must be able to type a minimum of 60 words per minute;²⁸ CAs may not alter the content of a conversation;²⁹ and relay centers must remain open 24 hours a day.³⁰ In summary, when relay centers are required to provide access to services outside their control, the Commission has required them to implement procedures that accommodate relay users to those services as they exist. The Commission does not guarantee or require the accommodations to be successful.³¹

MCI implemented the pay-per-call accommodations required in the *Internet Relay Order*. It developed procedures to allow callers to reach pay-per-call providers. It also developed procedures to pass credit card and telephone numbers to the pay-per-call provider, as required in

²⁸ 47 §64.604(a)(1).

²⁹ 47 §64.604(a)(2).

³⁰ 47 §64.604(b)(4).

³¹ The D.C. Court of Appeals recently rejected the Commission's anti-slamming rule requiring carriers to guarantee that the actual subscriber had authorized a service change. See *AT&T Corp. v. FCC*, 323 F.3d 1081 (2003).

the *Order*. MCI expected pay-per-call providers would accept this information, just as the Commission did. MCI did not have the authority to require pay-per-call providers to accept the billing information it had trained its CAs to provide. MCI complied with the specific pay-per-call accommodations required by the Commission, and expected to be found in compliance with its pay-per-call requirements. As with HCO, MCI complied with the specific procedures required in the *Internet Relay Order*, and it believes it is entitled to full reimbursement for its IP Relay service. MCI requests the Commission to clarify that its pay-per-call requirement did not prohibit IP Relay providers from disconnecting if the pay-per call provider did not accept the caller's billing information.

B. The Commission Should Clarify Whether Its Rule Exempting TRS Providers From Completing Calls That Do Not Receive Credit Authorization Applies To The Provision Of Pay-Per-Call Service Over IP Relay

MCI also felt confident its practice of disconnecting callers if the pay-per call provider did not accept the caller's billing information was acceptable, because the Commission's rule requiring relay providers to handle calls normally provided by common carriers exempts relay providers from completing calls if credit authorization is denied.³² This rule recognizes that relay providers are not required to connect a caller to a toll or pay service if the service provider refuses to bill the caller. In these circumstances relay providers are not required to connect a caller, pay for the call, and then seek reimbursement from the calling party. MCI requests the Commission to clarify that this exemption provides an additional authority for IP Relay providers to disconnect calls when pay-per-call providers do not accept billing information from the caller.

³² 47 C.F.R. § 64.604(a)(3).

V. THE COMMISSION SHOULD RECONSIDER ITS DECISION TO DENY COST RECOVERY TO IP RELAY PROVIDERS WHO PROVIDED ALL MANDATORY SERVICES EXCEPT HCO AND 900 NUMBER SERVICES

MCI faithfully implemented the HCO and pay-per-call requirements, as they were articulated, in the Commission's *Internet Relay Order*. If the Commission nevertheless concludes that it did not engage in retroactive rulemaking when it determined that only single line HCO would satisfy the IP Relay HCO requirement and, that its pay-per-call rule required providers to succeed in connecting with a pay-per-call provider, MCI asks the Commission to reconsider its decision to deny cost recovery to IP Relay providers who provided all mandatory services except HCO and either tried to provide access to 900 number services or immediately recognized access to pay-per-call services was technically infeasible.³³

A. The Commission Has Never Denied Complete Reimbursement If Relay Providers Failed To Comply With Minor Aspects Of TRS Requirements

HCO and pay-per-call services are services that are only infrequently demanded. Communication Services for the Deaf (CSD) states that HCO accounts for only .06% of Sprint's traditional relay calls.³⁴ Pay-per-call demand is infinitesimally small, accounting for .0005% of MCI's traditional relay traffic. Between the dates the *Internet Relay Order* and the *Reconsideration Order* were released, IP Relay providers offered service to millions of customers. Denying reimbursement of the cost of carrying millions of calls for being unable to carry three out of every five thousand calls would be an extreme measure, and is in complete

³³ If the Commission determines that two-line HCO did satisfy the former HCO requirement, and also finds that carriers, such as MCI, who attempted to connect to pay-per-call services were allowed to disconnect if billing information was not accepted, it should not deny reimbursement to carriers, such as Sprint, who immediately recognized that pay-per-call providers would not accept billing information, and who therefore did not attempt to connect to pay-per-call services.

³⁴ *Ex Parte letter from Karen Peltz Strauss, CSD, to Marlene Dortch*, December 20, 2002, CC Docket No. 98-67. Note, CSD incorrectly calculated the percentage of HCO as equal to .00006%.

contradiction to Commission precedent regarding incomplete implementation of TRS requirements.³⁵

In its *TRS Order* implementing Section 225 of the Communications Act, the Commission required carriers, the entities responsible for implementing TRS, to ensure that TRS users would be able to use coins to access relay centers from payphones by July 26, 1993.³⁶ Before the deadline, numerous carriers and state commissions petitioned the Commission to extend the deadline for complying with this TRS requirement. In its first *Coin Sent Paid Suspension Order*, dated November 29, 1993, the Commission granted a two year extension of this requirement.³⁷ The Commission did not seek to impose penalties on carriers, nor did it seek a return of funds TRS providers had received between the date of the compliance deadline and the date the deadline was extended. Rather, the waiver was made retroactive to July 26, 1993.

A full statement of the Commission's treatment of incomplete compliance with TRS mandates is contained in its *Publix Show Cause Order*.³⁸ In that Order the Commission established how to treat reimbursement for entities that may not fulfill all of its minimum mandatory standards.

We recognize that absolute compliance with each component of the rules may not always be necessary to fulfill the purposes of the statute and the policy objectives of the implementing rules, and that not every minor deviation would justify

³⁵ $3 \div 5000 = .06\%$.

³⁶ *Telecommunications Services for Individuals with Hearing and Speech Disabilities and the Americans with Disabilities Act of 1990*, CC Docket No. 90-571, Report and Order and Request for Comments, 6 FCC Rcd 4657 (1991) ("TRS Order").

³⁷ *Telecommunications Relay Services and the Americans with Disabilities Act of 1990*, Order, (*Coin Sent Paid Suspension Order*) CC Docket No. 90-571, 8 FCC Rcd 8385 (1993).

³⁸ *In the Matter of Publix Network Corporation; Customer Attendants, LLC; Revenue Controls Corporation; SignTel, Inc.; and Focus Group, LLC; Order to Show Cause and Notice of Opportunity for Hearing, Order to Show Cause and Notice of Opportunity for Hearing (Publix Show Cause Order)*, 17 FCC Rcd 11487, 11494 (2002).

withholding funding from a legitimate TRS provider. We therefore hold that a TRS provider is eligible for TRS Fund reimbursement if it has substantially complied with Section 64.604. This approach will allow a finding that an insignificant violation of the requirements of the implementing regulations does not render the Publix Companies ineligible so long as the Publix Companies have satisfied the underlying purposes of those requirements. (&19)

The Commission's view is that if an entity is substantially providing TRS, and only failing to implement minor aspects of its mandatory minimum requirements, it should be eligible for TRS Fund reimbursement. The Commission did not establish a benchmark for determining what constitutes "minor deviation" or "substantial compliance." Undoubtedly this would need to be done on a case-by-case basis.

The Consumer and Governmental Affairs Bureau has applied this precedent in its handling of reimbursement of international-international calls over IP-Relay. Soon after the Commission approved IP Relay for reimbursement in April 2002, it became apprised of the possibility that IP Relay could facilitate international-international communications. Such calls are not eligible for reimbursement from the Interstate TRS Fund, and relay providers receiving reimbursement for such calls would be benefiting from unapproved uses of the TRS Fund by international-international callers. Not only did the Bureau not suspend all IP Relay reimbursement when it discovered this, it did not even suspend reimbursement for international IP Relay minutes. The Commission should not adopt a stricter penalty standard for deviating from its requirements for HCO and pay-per-call than for international calls, when deviations from TRS requirements were equally beyond the control of relay providers.

B. The Commission Regularly Issues Retroactive Waivers To Promote The Public Interest

The Commission has granted retroactive waivers when the need for the waiver was not the fault of the carrier and the retroactive application of the waiver served the public interest.

The Commission established January 1, 1998 as the date by which states needed to certify

eligible telecommunications carriers in order for those carriers to be eligible to receive Federal universal service support.³⁹ Later, the Commission determined that if a carrier sought determination as an eligible telecommunications carrier before January 1, 1998, but did not receive this designation by that date, it could file a request for a retroactive waiver back to January 1, 1998 once it did receive the needed designation. The Commission explained that it would find these waivers to be in the public interest, since it would allow the carrier's customers to receive more affordable telephone service.⁴⁰ Since then the Commission has issued other retroactive waivers pursuant to this decision.⁴¹

The Commission recently granted a retroactive waiver to Electronic Micro Systems (EMS), a manufacturer of elevator emergency telephones, even though a competitor filed a formal complaint that it had violated the Commission's Part 68 rules. Even though the Commission agreed that EMS had violated its rules, it nevertheless granted a retroactive waiver,

³⁹ *Listing of Changes Adopted in the May 8 Order that Will Take Effect January 1, 1998*, Public Notice, DA 97-1747 (1997); *Common Carrier Bureau Announces Procedures for States Regarding Lifeline Consents, Adoption of Intrastate Discount Matrix for Schools and Libraries, and Designation of Eligible Telecommunications Carriers*, Public Notice, DA 97-1892 (1997).

⁴⁰ "Allowing retroactive support will permit consumers served by those carriers to benefit from the support to which those carriers would have been entitled, but for circumstances that prevented the state commission from designating the carriers as eligible for receipt of universal service support prior to January 1, 1998." *In the Matter of Federal-State Joint Board on Universal Service; Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge*, CC Docket No. 96-45, 13 FCC Rcd 5318, 5333 (1997).

⁴¹ *In the Matter of Federal-State Joint Board on Universal Service, Colorado Public Utilities Commission Petition for Retroactive Universal Service Support for Great Plains Communications*, CC Docket No. 96-45, 13 FCC Rcd 15486 (1998); *In the Matter of Federal-State Joint Board on Universal Service, Petition of the Public Service Commission of the District of Columbia for Waiver; Petition for Waiver; Petition for Waiver of Section 214(e) and 254(e) of the Telecommunications act of 1996 filed by the New Jersey Board of Public Utilities*, CC Docket No. 96-45, 13 FCC Rcd 21996 (2000)

because there was no evidence that the violation was willful, and no harm was done to the public.⁴²

The Commission has also issued retroactive waivers to allow schools to receive E-rate funding. Eastern Lebanon County School District and Newport News Public Schools failed to certify they had complied with the Children's Internet Protection Act (CIPA). As a result, the Schools and Libraries Division (SLD) returned their application. The schools certified they complied with CIPA, but only after the filing deadline had passed. Without the waiver, the schools would have been denied subsidized telecommunications services for a year. The Commission granted a retroactive waiver because it determined that both applicants had made a good faith effort to comply with the filing deadline, that the reason for their late filing was due in part to a Commission decision to establish an additional one-time deadline to implement CIPA, and that their only deviation from filling out a complete form on the initial filing was related to the Commission's decision.⁴³

C. Applying Principles The Commission Has Used To Grant Previous Retroactive Waivers Argues Strongly For Retroactive Waivers of HCO and Pay-Per-Call Requirements

The Commission states that Sprint and other IP Relay providers were aware that they were not in full compliance with TRS requirements, and therefore had no settled expectations of payment.⁴⁴ But MCI and other providers of IP Relay did have settled expectations of being reimbursed, for the circumstances present in the provision of IP Relay perfectly meshed with

⁴² *Rath Microtech Complaint Regarding Electronic Micro Systems, Inc., Elevator Emergency Telephones; Electronic Micro Systems, Inc., Petition for Waiver*, 16 FCC Rcd 16710, 16713-16714 (2001).

⁴³ *In the Matter of Requests for Waiver by Eastern Lebanon County School District, Myerstown, Pennsylvania; Newport News Public Schools, Newport News, Virginia; Federal-State Joint Board on Universal Service; Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, 2003 FCC LEXIS 1503 (2003).

⁴⁴ *Reconsideration Order*, & 26.

earlier cases where the Commission had granted retroactive waivers. Reviewing the reasons the Commission relied upon to grant other retroactive waivers, one gleans several principles.

Retroactive waivers should be granted when:

- providers were in substantial compliance with the rules,
- failure to comply was not the fault of providers, and may have been due, in part, to a Commission decision,
- a good faith effort was made to comply with the rule that was ultimately waived,
- special circumstances are present, and
- the public will benefit from the waiver.

These principles have been stated generally in the Commission's waiver standard, which states that waivers should be granted when "special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule."⁴⁵

The decisions on which these principles have been derived are in the public domain, and have not been challenged or overturned on appeal. They formed the basis on which IP Relay providers were confident that they would not be penalized for providing service even if they were deemed to have been found out of compliance with two insubstantial requirements.

1. Providers were in substantial compliance with the rules

There can be no dispute that those providing IP Relay during the period in question were in substantial compliance with the rules. None of the providers received formal or informal complaints about their IP Relay services. No one complained about not being able to use single line HCO or access a 900 number service. In any case, HCO and pay-per-call services are extremely seldom used services, accounting for six one hundredth (.06%) of a percent of relay traffic.

⁴⁵ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

2. Failure to comply was not the fault of relay providers

There is no question that the failure to comply with the HCO and pay-per-call requirements was not the fault of IP Relay providers. The Commission recognized in its Reconsideration Order that it is not currently technically feasible to provide single line HCO or to successfully connect to pay-per-call services.⁴⁶

3. A good faith effort was made to comply

All IP Relay providers were offering two-line HCO, the form of HCO most clearly articulated in the *Order*. MCI developed extensive procedures to allow callers to connect to pay-per-call services, and for five months allowed itself to be billed for those calls in order to comply with the pay-per-call requirement. And Sprint immediately contacted the Commission by filing a petition for reconsideration, as soon as it knew it was impossible to successfully connect to pay-per-call providers and provide single line HCO.

4. Special circumstances are present

The Commission was establishing standards for a new technology. It is inevitable that there will be unforeseen glitches and circumstances, and thus the need to correct the standards associated with any new technology. But there should be no need for additional corrections or waivers after initial corrections are made.

5. The public will benefit from a retroactive waiver

There is also no doubt that the public will benefit from a retroactive waiver. During the period in question, IP Relay providers offered millions of customers the ability to access relay service using any web-capable device, offered them free toll calling, offered them the ability to more easily access relay away from home without having to bring their TTY, offered them

⁴⁶ Id., §§ 15-22.

greater ability to access relay from work, and offered them a choice of relay providers, to name just a few of the benefits. IP Relay providers spent millions of dollars on equipment, training and staffing in order to serve these customers.

Denying retroactive waivers would be a serious financial blow to the IP Relay business units of AT&T, Sprint, and MCI, and would make it difficult for them to improve the capabilities of IP Relay. The Commission hopes IP Relay providers will solve a number of technical problems in the next five years, including the ability to access IP Relay by voice, the ability to pass originating location information to the nearest public service answering point, and the ability to provide single line HCO. Denying retroactive waivers will significantly delay these developments.

Denying retroactive waivers for minor infractions will establish a precedent that will delay the introduction and diffusion of innovative relay technologies for years to come. Innovators will be reluctant to begin to offer service if there is any ambiguity in the decision approving their service. The Commission says that providers should have waited for the Commission to respond to Sprint's petition to reconsider the single line HCO and pay-per-call requirements before initiating service.⁴⁷ Sprint immediately petitioned the Commission, yet it took the Commission eight months to determine it was wrong to require single line HCO and successful access to pay-per-call services.⁴⁸ The Commission's stated policy would require a relay provider, upon discovering an inability to comply with even a minor requirement, to

⁴⁷ Id., & 26.

⁴⁸ Neither can the Commission expect that providers would be able to seek informal clarification from Commission staff or NECA. Sprint reports that it did seek informal clarification about the possibility of retroactive waivers and was told by NECA, with the Commission present, that it would be entitled to receive retroactive reimbursement for the three months prior to the approval of any forthcoming waivers. Yet, in the end, no retroactivity was permitted. See Ex Parte Letter to Marlene Dortch, October 31, 2002, CC Docket No. 98-67.

immediately stop service, lay off persons hired to staff the service, and wait six months to a year while the Commission issues a decision. Applied to this instance, consumers who had been demanding the Commission approve IP Relay for over a year, would have had to go another six months to a year before obtaining full access to IP Relay.⁴⁹

Denying retroactive waivers for minor infractions will also encourage competitors who are not ready to offer an innovative service to look for any difficulty an innovating company might have in meeting a requirement, even an insubstantial one, in order to gain time to develop a competing service. The extremely rigid application of its requirements in the *Reconsideration Order* will invite such gaming. If the Commission fails to grant retroactive waivers from extremely minor services, the provision of which all agree were not technically feasible, it will unleash negative forces that will retard the widespread adoption of future innovative relay services.

The Commission has stated some concern that another provider might have delayed providing IP Relay until the Commission modified its requirements and should not be penalized.⁵⁰ It is possible to identify another party who is harmed in all other cases of retroactive waivers. The retroactive waiver granted to EMS and its customers, denied Rath Microtech the ability to market its elevator phones since EMS' phones did not need to be removed. The retroactive waivers granted to Lebanon and Newport News reduced the amount of E-rate funds available for other schools and libraries. And the retroactive waivers granted to late-filing eligible telecommunications providers required the customers of interexchange carriers to contribute greater sums of money to the Universal Service Fund. In granting all these waivers,

⁴⁹ MCI had been offering the service for 16 months prior to its approval, but only on a very restricted basis.

⁵⁰ *Reconsideration Order*, & 26.

the Commission rightly focused only on whether the waiver would benefit the general consuming public.

The Commission does not need to be concerned that granting retroactive waivers in this case will encourage carriers to “provide regulated services in contravention of our rules, with the hope they will eventually be retroactively rewarded for providing the services.”⁵¹ The present circumstances are special, are not easily reproduced, and so would not encourage providers to break Commission rules. First, the service provider must substantially comply with required services and capabilities. The infractions would need to involve services or capabilities very infrequently used. Second, the provider would have to be very certain they would prevail in showing the requirement is not technically feasible. If they do not prevail, they would not be entitled to retroactive reimbursement. The risk involved is substantial. Only a fool would risk eleven months of reimbursement on a mere hope. Third, the provider must demonstrate that the waiver is in the public interest. If the violations are not inconsequential, the relay community will strongly oppose the petition. In this case the user community has not opposed Sprint’s request for retroactive waiver, and in fact TDI supported it.⁵² Finally, the present request for waivers involves a new technology. New technologies will inevitably require second-round adjustments to required standards. If the Commission identifies these as a necessary conditions for granting retroactive waivers, it will not be establishing a precedent or incentive for a flood of requests for retroactive waivers.

⁵¹ *Id.*, & 26.

⁵² *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, TDI Reply to Petitions for Reconsideration*, CC Docket No. 98-67, December 9, 2002 at 6.

VI. CONCLUSION

For the reasons discussed herein, MCI respectfully requests Commission to grant its petition to clarify whether IP Relay providers were required to succeed in connecting to pay-per-call providers if they did not accept alternate billing methods, to reconsider its decisions to eliminate two-line HCO as a means by which IP Relay providers could satisfy the Hearing Carryover (HCO) requirement, and to reconsider its decision denying retroactive application of the single line HCO and pay-per-call waivers.

Respectfully submitted,

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Statement of Verification

I have read the foregoing, and to the best of my knowledge, information, and belief, there is good ground to support it, and it is not interposed for delay. I verify under penalty of perjury that the foregoing is true and correct.

Executed on May 16, 2003

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Certificate of Service

I, L. Elizabeth Bryant, do hereby certify that copies of the foregoing Petition for Reconsideration of WorldCom Inc. were sent on this 16th day of May, 2003, via first-class mail, postage pre-paid, to the following:

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